

1 THE HONORABLE THOMAS S. ZILLY

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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA ex rel.
11 SANDLIN GRAYSON,

12 Plaintiff,

13 vs.

14 GENOA HEALTHCARE, a d.b.a of GENOA
15 HEALTHCARE HOLDINGS, LLC, a
16 Corporation; and GENOA HEALTHCARE
17 OF WASHINGTON, LLC, a Washington
18 corporation,

19 Defendants.

No. C09-506Z

ORDER

20 THIS MATTER comes before the Court on defendants' motion to dismiss,
21 docket no. 23. Plaintiff and relator Sandlin Grayson brings suit individually and on
22 behalf of the United States. The United States has declined to intervene in this *qui tam*
23 action. For the reasons set forth below, the defendants' motion is GRANTED in part,
24 and DENIED in part.
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1 **Background**

2 On October 13, 2008, relator Sandlin Grayson began working at Genoa
3 Healthcare (“Genoa”) as a corporate Billing Manager. Grayson Decl. at ¶ 2. Genoa
4 owns and operates a chain of pharmacies located in community mental health centers
5 (“CMHCs”). *Id.* at ¶ 3. Each pharmacy provides on-site pharmacy services to CMHC
6 patients and also serves walk-in patients. *Id.* A majority of Genoa’s patients are
7 Medicare and Medicaid beneficiaries. *Id.* at ¶ 4. As a result, Genoa bills and receives
8 payments from Medicare and Medicaid for providing medications to many of its
9 patients. *Id.* Genoa pharmacies fill approximately 1,500-2,000 prescriptions for
10 Medicare beneficiaries per month. *Id.*

13 In December, Mr. Grayson began to notice that the Genoa branch in Madison,
14 Wisconsin was waiving copayments for some patients. Grayson Decl. Exh. E, at 1.
15 He also learned that other Genoa staff members believed copayments were routinely
16 being waived at three Genoa locations in Oregon. *See id.* at 2. Ms. Heather Wells,
17 Billing Department Lead at Genoa Healthcare, told Mr. Grayson that previous
18 employees had attempted to address the waiver of copayments at the Madison branch.
19 However, Ms. Wells said that the waivers continued because Genoa managers decided
20 that the relationship with the CMHC in Madison was “too big to lose.” Complaint at
21 ¶ 3.11.

24 Mr. Grayson informed his supervisor, Mr. Ryan Niemeyer, Genoa Controller,
25 about the waiver of copayments. *Id.* at ¶ 3.12. Soon after, Mr. Grayson participated in
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1 a conference call with Genoa managers and the pharmacist in charge of the Madison
2 branch. Id. at ¶ 3.13. During the conference call, a Genoa manager stated “there had
3 either been a written contract or a verbal agreement with the CMHC in Madison to
4 waive copayments under \$3.10.” Id. After this conversation, Genoa CEO, Mr. Vic
5 Breed, asked Mr. Grayson to investigate whether copayments were routinely being
6 waived at other branches. Id. at ¶ 3.16.

8 On January 6, 2009, Mr. Grayson reported Genoa’s Medicare copayment
9 waivers to the Office of the Inspector General of the Department of Health and Human
10 Services. Id. at ¶ 3.17. On January 11, 2009, Mr. Grayson emailed the Genoa Board
11 of Directors informing them of his belief that the “Compliance Officer and
12 Management of Genoa Healthcare has failed in detecting a large scale fraud and/or has
13 participated in its development and concealment.” Complaint, Exh. C.

15 Genoa terminated Mr. Grayson on April 2, 2009. Grayson Decl. at ¶ 2. Genoa
16 told Mr. Grayson he was terminated because he exhibited “insufficient commitment to
17 the company.” Id. However, Mr. Grayson believes he was fired because he was
18 attempting to bring the company into compliance with Medicare billing laws and
19 regulations and that “management viewed [his] efforts as some kind of betrayal.” Id.

21 In the complaint, Mr. Grayson alleges that Genoa had an agreement with
22 CMHCs in Wisconsin and Oregon that copayments would be routinely waived.
23 ¶¶ 3.6-3.12. He alleges these waivers were kickbacks to the CMHCs because in many
24 cases the CMHCs were the parties responsible for paying for the copayment. Id. at
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¶ 3.3. In addition, Mr. Grayson alleges that Genoa billed Medicare for at least some prescriptions that were never dispensed to patients at the Genoa pharmacy in Burien, Washington. *Id.* ¶ 3.27. Mr. Grayson also alleges that the Genoa pharmacy in Everett, Washington changed the dates of service on medications after they were dispensed to patients as a means of ensuring that the Medicare claims would be accepted. *Id.* at ¶ 3.31. Finally, Mr. Grayson alleges he was terminated because he opposed alleged illegal practices in violation of 31 U.S.C. § 3730(h). *Id.* at ¶ 6.1.

Discussion

A. Legal Standards

1. Federal Rule of Civil Procedure 12(b)(6)

When ruling on a 12(b)(6) motion, the Court must construe the complaint “in the light most favorable to the plaintiff.” *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). The Supreme Court has explained that “when allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). In the complaint, the plaintiff must show a “plausible entitlement to relief,” which requires more than a mere “formulaic recitation of the elements of a cause of action.” *Id.* at 555. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

1 **2. Federal Rule of Civil Procedure 9(b)**

2 The requirements of Rule 9(b) apply to False Claims Act (“FCA”) actions.
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4 United States ex rel. Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001).
5 Rule 9(b) requires a party alleging fraud to “state with particularity the circumstances
6 constituting fraud.” Fed. R. Civ. P. 9(b). To comply with Rule 9(b), allegations of
7 fraud must state the who, what, when, where and how of the misconduct. Vess v.
8 Ciba-Geigly Corp., 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff/relator is not
9 required to identify representative false claims to support every allegation; rather, the
10 Ninth Circuit has concluded that “it is sufficient to allege ‘particular’ details of a
11 scheme to submit false claims paired with reliable indicia that lead to a strong
12 inference that claims were actually submitted.” U.S. ex rel. Ebeid v. Lungwitz, 616
13 F.3d 993, 998-999 (9th Cir. 2010).
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15 **B. Plaintiff’s Claims Under the False Claims Act**

16 The FCA prohibits (1) the presentment of a false claim to the government,
17 (2) the use of a false record or statement to get a false claim paid, and (3) conspiracies
18 to get a false claim paid. See 31 U.S.C. § 3729(a)(1)-(3).
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20 The complaint presents three theories by which Genoa submitted false claims to
21 the government. The complaint alleges that Genoa submitted false claims to the
22 government by (1) routinely waving copayments, (2) billing Medicare for some
23 prescriptions that were never dispensed to patients, and (3) changing the dates of
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1 service on medications after they were dispensed to patients so that Medicare claims
2 would not be rejected.

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4 **1. The theory that Genoa submitted false claims because the**
5 **Genoa pharmacy in Madison, Wisconsin and three**
6 **pharmacies in Oregon waived routinely waived copayments.**

7 The complaint alleges that a Genoa pharmacy in Madison, Wisconsin and three
8 pharmacies in Oregon routinely waived copayments. Complaint at ¶¶ 3.6-3.9. In
9 addition, the complaint alleges that Genoa pharmacies fill approximately 1,500-2,000
10 prescriptions for Medicare beneficiaries per month. *Id.* at ¶ 3.1. However, the
11 complaint lacks any allegations that Genoa submitted claims to the government for
12 which copayments were waived. Moreover, the complaint cites the outdated
13 Department of Health and Human Services Special Fraud Alert for the proposition that
14 the routine waiver of copayments results in false claims. *See id.* at ¶ 3.4. Without
15 including reference to a current statute, regulation, or case authority stating that the
16 waiver of copayments alone could result in a false claim, the complaint does not “state
17 a claim for relief that is plausible on its face.” *Ashcroft*, 129 S.Ct. at 1949. Therefore,
18 the complaint fails to state a claim under 12(b)(6).
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20 The complaint also fails to satisfy the requirements of Rule 9(b). Relators are
21 not required to plead representative examples of false claims submitted to the
22 government to support every allegation, but they must plead with sufficient
23 particularity to lead to a strong inference that false claims were actually submitted.
24 *Ebeid*, 616 F.3d at 998-999. The complaint does not allege that Genoa submitted
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1 claims to the government for which copayments were waived; the complaint merely
2 states generally that Genoa pharmacies “fill approximately 1,500-2,000 prescriptions
3 for Medicare beneficiaries per month.” *See* Complaint at ¶ 3.1. Thus, the complaint
4 does not provide reliable indicia that leads to a strong inference that false claims were
5 actually submitted. *See Ebeid*, 616 F.3d at 998-999. As a result, the complaint fails to
6 satisfy Rule 9(b).
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8 **2. The theory that Genoa submitted false claims because the**
9 **Genoa pharmacy in Burien, Washington billed Medicare for**
10 **some prescriptions that were never dispensed to patients.**

11 The complaint alleges that medications should not be billed to Medicare if the
12 patient does not pick up the prescription. *Id.* at ¶ 3.26. Even if these allegations are
13 taken as true, “[v]iolations of laws, rules or regulations alone do not create a cause of
14 action” under the FCA. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.
15 1996). Rather, “some request for payment containing falsities made with scienter (i.e.,
16 with knowledge of the falsities and with intent to deceive) must exist.” *Id.* at 1265.
17 The complaint does not allege that Genoa knowingly submitted bills to Medicare for
18 prescriptions that were not dispensed to patients. In addition, the complaint does not
19 allege that Genoa intended to deceive Medicare by requesting payment for
20 medications that were not dispensed to patients. Accordingly, the complaint fails to
21 state a claim under 12(b)(6).
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24 The complaint also fails to satisfy the requirements of Rule 9(b). The
25 complaint alleges that the Genoa pharmacy in Burien, Washington, billed Medicare for
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1 some prescriptions that were never dispensed to patients. Complaint at ¶ 3.27. To
2 comply with Rule 9(b), allegations of fraud must state the who, what, when, where and
3 how of the misconduct. Vess, 317 F.3d at 1106 (9th Cir. 2003). In U.S. ex rel. v. Ctr.
4 for Diagnostic Imaging, 2011 WL 1304727, *8 (W.D. Wash 2011), the plaintiff's
5 complaint alleged that the defendant's physicians "performed two x-rays on patients as
6 an 'added service' to referring patients . . . for no charge" to induce referrals of
7 governmental insured and privately insured patients. The defendant's brought a
8 motion to dismiss for failure to allege fraud with sufficient particularity. Id. The court
9 concluded that the plaintiff's failed to satisfy the pleading requirements of 9(b). Id.
10 The court reasoned that the complaint failed to alleged the "who" (patient names) and
11 the "when" (when the free services were allegedly offered and/or performed) required
12 by Rule 9(b). Id. Similarly, in this case, the complaint fails to allege the who and
13 when of the alleged fraud to bill Medicare for prescriptions that were not dispensed to
14 patients. Neither the complaint, nor the attached Exhibit E (an email from Heather
15 Wells to the plaintiff regarding the prescriptions at the Burien pharmacy that were not
16 dispensed to patients), include information about the names of the patients that did not
17 pick up their prescriptions or the dates that these prescriptions were actually billed to
18 Medicare. Therefore, the complaint fails to satisfy Rule 9(b).
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1 **3. The theory that Genoa submitted false claims because the**
2 **Genoa pharmacy in Everett, Washington changed the dates of**
3 **service on medications after they were dispensed to patients so**
4 **that Medicare claims would not be rejected.**

5 The complaint alleges that the Genoa pharmacy in Everett, Washington
6 changed the dates of service on medications billed to Medicare after they were
7 dispensed to patients so that Medicare claims would not be rejected. Complaint at
8 ¶ 3.31. The complaint also alleges that the dates of service affect whether or not
9 Medicare will pay for the prescription drugs. *Id.* at ¶ 3.30. Here, the complaint alleges
10 that the pharmacy in Everett knowingly changed the dates of service from the correct
11 date to a date that was false with the intention of getting Medicare to pay for
12 prescriptions it would not otherwise pay for. *Id.* at ¶ 3.31. As a result, the complaint
13 alleges that claims were submitted to Medicare and that the claims contained “falsities
14 made with scienter.” *Hopper*, 91 F.3d at 1266. Therefore, the complaint states a claim
15 under the FCA.
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17 However, the complaint fails to satisfy the requirements of Rule 9(b). Relators
18 are not required to plead representative examples of false claims submitted to the
19 government to support every allegation, but they must plead with sufficient
20 particularity to lead to a strong inference that false claims were actually submitted.
21 *Ebeid*, 616 F.3d at 998-999. Although the complaint references Exhibit F (an email
22 discussing a specific instance of a date of service being changed), this exhibit does not
23 reference Medicaid or suggest that the medications referenced in the email were billed
24 to Medicaid. *See* Complaint Exh. F. The facts alleged in the complaint do not lead to
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1 a strong inference that claims for which the dates of service were changed were
2 actually submitted to the government. See Ebeid, 616 F.3d at 998-999. Therefore, the
3 complaint fails to satisfy Rule 9(b).
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5 **4. Conclusion**

6 In sum, the first two theories presented in the complaint fail to state a claim
7 under Rule 12(b)(6) and fail to meet the particularity requirements of Rule 9(b). The
8 third theory presented in the complaint states a claim under Rule 12(b)(6), but fails to
9 meet the particularity requirements of Rule 9(b). As a result, the Court GRANTS
10 defendants' motion to dismiss plaintiff's FCA claims without prejudice and with leave
11 to file an amended complaint.
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13 **C. Plaintiff's Claim Under the Civil Monetary Penalties Law**

14 Mr. Grayson lacks standing to bring a claim under the Civil Monetary Penalties
15 Law ("CMPL"). The CMPL permits the Secretary of Health and Human Services to
16 levy civil monetary penalties and assess treble damages against medical providers who
17 file false or otherwise improper claims for payment in certain federal healthcare
18 programs. 42 U.S.C. § 1320a-7a(a); see also United States ex rel. Gonzalez v.
19 Fresenius Medical Care, 2010 WL 1645969, at *8. In Gonzalez, a relator in a *qui tam*
20 attempted to build a FCA suit based upon violations of the CMPL. Id. The court
21 concluded that the relator lacked standing, reasoning that "[the] relator does not cite,
22 and the Court has not found, any case in which a relator in a *qui tam* action has
23 successfully built a FCA suit upon violations of the CMPL." Id. As a result, the Court
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1 GRANTS Genoa's motion to dismiss the claim under the CMPL with prejudice
2 because amendment would be futile.

3 **D. Plaintiff's FCA Retaliation Claim**
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5 If accepted as true, the complaint sets forth sufficient facts to constitute a
6 plausible FCA retaliation claim. The FCA protects whistle blowers from retaliation by
7 their employers. Moore, 275 F.3d at 845. Unlike a FCA claim, a FCA retaliation
8 claim does not need to meet the requirements of Rule 9(b). Mendiondo v. Centinela
9 Hosp. Medical Center, 521 F.3d 1097, 1103 (9th Cir. 2008). Under 31 U.S.C.
10 § 3730(h) employers cannot discharge an employee "because of lawful acts done by
11 the employee . . . in furtherance of an action under the FCA." An employee must
12 prove three elements in a FCA retaliation claim: (1) that the employee engaged in
13 activity protected under the statute; (2) that the employer knew that the employee
14 engaged in protected activity; and (3) that the employer discriminated against the
15 employee because she engaged in protected activity. Moore, 275 F.3d at 845.
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18 In Moore, the court described the first element of a FCA retaliation claim as
19 follows: An employee engages in protected activity "where (1) the employee in good
20 faith believes, and (2) a reasonable employee in the same or similar circumstances
21 might believe, that the employer is possibly committing fraud against the
22 government." Id. In this case, the complaint references Mr. Grayson's email to the
23 Genoa Board of Directors in which he expressed the belief that the routine waiver of
24 copayments constituted fraud. See Complaint ¶ 3.12. In addition, Mr. Grayson called
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1 the Office of the Inspector General of the Department of Health and Human Services
2 and reported his employer for waiving Medicare copayments. *Id.* at ¶ 3.17. Mr.
3 Grayson alleges sufficient facts to support a good faith belief that Genoa’s policies
4 were fraudulent. Second, the complaint alleges that a previous billing manager, Brigit
5 Sammon, similarly believed the waivers of copayments were fraudulent. *Id.* at ¶ 3.9.
6 As a result, the complaint alleges sufficient facts that Mr. Grayson was engaged in a
7 protected activity under the FCA as required by *Moore*. *See id.* 275 F.3d at 845.
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10 Considering the second element, the complaint alleges sufficient facts that
11 Genoa knew Mr. Grayson was engaged in protected activity under the FCA. *See id.*
12 In *Mendiondo*, an employee brought a FCA retaliation claim alleging in her complaint
13 that she complained to her employer that the company was possibly committing “civil
14 and criminal violations.” 521 F.3d at 1104. The court in *Mendiondo* said, “although
15 vague, the reference to civil violations can be construed to include the suspected
16 Medicare fraud” and that her employer was “informed of her protected activity.” *Id.*
17 In this case, Mr. Grayson gave his employer more notice of his protected activity than
18 the plaintiff in *Mendiondo*. *See id.* In his email to the Genoa Board of Directors, Mr.
19 Grayson clearly states his belief that “Genoa has implemented a plan to defraud the
20 Centers of Medicare/Medicaid and a variety of state Medicaid agencies.” Complaint,
21 Exh. C. As a result, the complaint adequately alleges that Genoa was informed that
22 Mr. Grayson was engaged in a protected activity.
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1 Finally, considering the third element, the complaint alleges that Genoa
2 retaliated against Mr. Grayson because he engaged in a protected activity. *See Moore*,
3 275 F.3d at 878-848. The court in *Mendiondo* said that it suffices at the pleading stage
4 for the plaintiff to simply give notice that he believes that he was terminated because
5 of his investigation into the practices specified in the complaint. 521 F.3d at 1104. In
6 this case, the complaint states that “Sandlin Grayson’s employment was terminated
7 because he opposed illegal practices referenced herein.” Complaint at
8 ¶ 6.1. As a result, the complaint adequately alleges that Genoa retaliated against him
9 because he engaged in a protected activity.
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12 The Court DENIES Genoa’s motion to dismiss Mr. Grayson’s FCA retaliation
13 claim.

14 **E. Plaintiff’s Wrongful Discharge Claim**

15 Mr. Grayson’s common law wrongful discharge claim is entirely duplicative of
16 his FCA retaliation claim. In *United States ex rel. Zemlenyi v. Group Health Coop.*,
17 2010 WL 3584444, *3, (W.D. Wash. Sept. 10, 2010) the court said that “[t]he
18 prevailing policy of Washington courts has been to deny common law wrongful
19 discharge claims when they are entirely duplicative of existing statutory remedies.”
20 As a result, the Court GRANTS Genoa’s motion to dismiss Mr. Grayson’s common
21 law wrongful discharge claim. The Court DISMISSES this claim with prejudice.
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1 **Conclusion**

2 For the reasons discussed above, the Court:

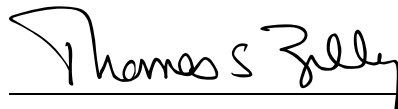
3 (1) GRANTS defendants' motion to dismiss plaintiff's claims under the False
4 Claims Act, 31 U.S.C. § 3729(a)(1)-(3), without prejudice and with leave to
5 file an amended complaint. Plaintiff must file any amended complaint
6 under the False Claims Act by August 19, 2011.

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8 (2) GRANTS defendants' motion to dismiss plaintiff's claim under the
9 Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a(a)(5), and
10 plaintiff's common law wrongful discharge claim with prejudice.
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12 (3) DENIES defendants' motion to dismiss plaintiff's FCA retaliation claim.

13 IT IS SO ORDERED.

14 DATED this 6th day of July, 2011.

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18 Thomas S. Zilly
19 United States District Judge
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